



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO. 35 OF 1999

ZACHARY O. NYANGINCHA.....PLAINTIFF

VERSUS

KENYA TOURIST

DEVELOPMENT CORPORATION.....1ST DEFENDANT

MARSABIT LODGE (K) LTD.....2ND DEFENDANT

MERU MULIKA LODGE LTD.....3RD DEFENDANT

TEA HOTEL LTD.....4TH DEFENDANT

JUDGMENT

In June, 1999 the Plaintiff filed this action against four Defendants claiming terminal and other benefits payable to him for work done and employment services rendered to each of them at different time, and for varying duration between June, 1985 and November, 1998.

According to him, the 1st Defendant, as the Managing Agent of the other three Defendants hired him on behalf of the other three Defendants. When he left the employment after 13

years, he was not paid his terminal dues amounting to shs 616,165; leave and travel allowances of shs 19,032; and salary arrears of shs 8000; all totaling shs 643,197 which he claims against all the Defendants.

Before the hearing of this suit began, the Plaintiff and the 3rd Defendant entered into a consent judgment whereby judgment was entered into against the 3rd defendant in the sum of shs 55,955/30. That disposes the case against the 3rd Defendant.

With respect to the 2nd Defendant, it was never served with the hearing notice for the hearing of the suit that commenced on January 29,2003. Mr. Eboso, Counsel for the plaintiff, conceded this omission, and chose to proceed with the hearing. As the hearing proceeded in its absence, the 2nd Defendant cannot be held liable in this suit, and no judgment can be entered against it. That, therefore, disposes the suit against the 2nd defendant.

This case then falls for determination of liability, if any, of the 1st and 4th Defendants to the Plaintiff with regard to his claim for terminal and other benefits. That, of course, depends upon who his employer was at the material time. www.kenyalawreports.or.ke 3

The Plaintiff provided extensive testimony about his employment with all the Defendants. He said he was employed by the 2nd defendant from May 6, 1985 to February 26, 1990. He produced a letter of

employment, and terms and conditions, both issued by the 2nd defendant. Although his employment was “facilitated” or “arranged” by the 1st defendant, he was clearly an employee of the 2nd Defendant, and answerable only to the 2nd Defendant. Of course, as I indicated before, the case against the 2nd defendant has been disposed. I mention these facts only to demonstrate the involvement of the 1st Defendant, and to determine whether the 1st Defendant could be classified as the “employer”. It was clearly not the employer, only an agent.

The Plaintiff then gave evidence that on February 26, 1990 he joined the 3rd Defendant. He did not exhibit a letter of employment. Apparently, there was none. However, he exhibited a letter issued by the 3rd Defendant (PEX.6) increasing his salary, which clearly indicated that he was an employee of the 3rd Defendant, even though there was evidence that the 1st defendant had arranged for his transfer from the 2nd to the 3rd defendant.

Finally, in 1992 he said that “he was moved from the 3rd defendant to the 4th defendant” where he worked until September 1998.

In cross examination by Mr. Migiro, Counsel for the 4th Defendant, the Plaintiff admitted that he did not receive a letter of employment from the 4th Defendant; that he was “seconded” to the 4th Defendant by the 1st Defendant; and that he was answerable only to the 1st Defendant. He stated further that he reported to the 1st Defendant. That when he wanted an increment he approached the 1st Defendant, and finally when he resigned, he tendered his letter of resignation to the 1st Defendant, not the 4th Defendant. There is, therefore, full acknowledgement by him that the 4th Defendant was not his employer and therefore no claims for terminal or other benefits can be made to the 4th Defendant. He acknowledged that the 4th Defendant paid him his pension contribution when he left them. I am satisfied on a balance of probability that the plaintiff has no claim against the 4th Defendant, and his suit against them is dismissed with costs to the 4th defendant.

This brings us finally to the claim against the 1st Defendant. What was the 1st defendant’s role? Was it the Plaintiff’s employer, or a mere agent facilitating employment for its various units, the other Defendants?

The 1st Defendant’s General Manager in charge of Personnel, Mr. Peter Ongeto, gave evidence on its behalf. He said that he had been with the 1st Defendant since 1983, and knew the Plaintiff all along. The 1st Defendant, he explained, is an investor in the other Defendant Companies, and in accordance with section 3(2) of the KTDC Act, the 1st Defendant’s role vis a vis the other Defendants is at policy level, and that it is not involved in the day to day management of the units (the other defendants).

He testified that the Plaintiff had never been an employee of the 1st Defendant, and that it merely facilitated employment by the other units, and helped coordinate staff movements from different units. He explained that they had never issued any letter of employment to the Plaintiff, and that with respect to his claim for terminal benefits, all the letters they wrote to him indicated that they were trying to recover his benefits from the other Defendants.

I have examined the records and exhibits before this court, and I find the 1st Defendant’s evidence consistent with their defence that the Plaintiff was not their employee, and that they are not liable to him for his terminal and other benefits.

The fact is that they never issued a letter of employment to the Plaintiff; that it was the other defendants (except the 4th Defendant) that issued such letters or assumed responsibility as employers; that the 1st Defendant only acted as an agent of the other Defendants, a fact that the plaintiff himself acknowledges in paragraph 4 of his plaint; and all the letters they wrote to him regarding terminal benefits were written as an agent for the other Defendants, and not as an “employer”. Exhibits 13, 14 and 16 are clear examples of this fact. The confusion apparently arose in the mind of the Plaintiff following his last employment with the 4th Defendant. There the latter had made it very clear that he was “seconded” to them by the 1st Defendant. The Plaintiff simply assumed that that makes the 1st Defendant his employer. That assumption was clearly wrong, as I find based on evidence before this court.

Accordingly, and for reasons outlined, this suit is dismissed against the 1st and 4th Defendants, with costs.

Dated and Delivered at Kericho this 5th day of May, 2004.

ALNASHIR VISRAM

JUDGE